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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1467

ITT LAMP DIVISION OF THE INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION,
*Petitioner,*

*vs.*

STEPHEN A. MINTER, COMMISSIONER OF THE MASSACHUSETTS DEPARTMENT OF PUBLIC WELFARE,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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ITT LAMP DIVISION OF THE INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION,
*Petitioner,*

*vs.*

STEPHEN A. MINTER, COMMISSIONER OF THE MASSACHUSETTS DEPARTMENT OF PUBLIC WELFARE,
*Respondent.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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Petitioner, ITT Lamp Division of the International Telephone and Telegraph Corporation, petitions for a writ of certiorari to review the judgment and decision of the United States Court of Appeals for the First Circuit entered in this case on December 14, 1970.

## OPINION BELOW.

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The opinion of the United States Court of Appeals for the First Circuit (App. A) is not yet officially reported. The opinion of the District Court for the District of Massachusetts (App. C) is not officially reported.

## JURISDICTION.

Jurisdiction to review by writ of certiorari the judgment and decision of the United States Court of Appeals for the First Circuit, entered December 14, 1970 (App. B), is invoked under the provisions of 28 U. S. C. § 1254 (1).

## QUESTION PRESENTED.

Whether the Commonwealth of Massachusetts can, in derogation of the Congressional policy of free collective bargaining, provide welfare benefits to individuals who deliberately refuse available employment by engaging in an economic strike?

## CONSTITUTIONAL PROVISION INVOLVED.

Article VI of the United States Constitution is set forth in Appendix D.

## STATUTES INVOLVED.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C. § 141 et seq.), the Massachusetts General Welfare and Aid to Families with Dependent Children Acts (Mass. G. L. c. 117 and 118) and the Social Security Act of 1935, 49 Stat. 620, as amended (42 U. C. S. §§ 301-1394), are set forth in Appendix E.

## STATEMENT OF THE CASE.

ITT Lamp Division (hereinafter called "Employer" or "ITT") manufactures incandescent and fluorescent lamps at its plant in Lynn, Massachusetts. Truck Drivers, Chauffeurs, Helpers, Local No. 42, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter called "Union"), is the exclusive collective bargaining representative for the approximately six hundred and sixty production employees at the Lynn plant.

After several months of bargaining for an initial collective bargaining agreement, ITT and the Union reached an impasse in their negotiations. On August 24, 1970, the Union called a strike to enforce its demands. The strike continued for several months. There was a complete cessation of ITT's operations causing economic loss to the Employer. The strikers also felt the economic disadvantages of the strike. In order to alleviate their economic disadvantages, approximately one hundred and seventy, or twenty-five per cent, of the striking employees applied for and received welfare benefits under the Massachusetts statutes providing General Welfare and Aid to Families with Dependent Children. Mass. G. L. c 117, 118.[1]

Because of the significant alteration of bargaining power, ITT brought suit in the District Court for the District of Massachusetts to enjoin the payment of any welfare benefits solely because of the strike. Then, as now, ITT contended that the payment of welfare benefits to strikers by the Commonwealth of Massachusetts constituted an inter-

1. The Massachusetts Aid to Families with Dependent Children statute is part of a comprehensive federal plan of providing assistance to needy families and must comply with the minimal requirements Congress has established. 42 U. S. C. § 602, *et seq.*

ference with its right to engage in full and free collective bargaining. ITT alleged—and it has never been denied—that such payments prolonged the strike and constituted a governmental subsidy to the Union. The District Court denied the Employer's Motion for a Temporary Restraining Order and the First Circuit Court of Appeals affirmed.[2]

## REASONS FOR GRANTING THE WRIT.

### I. FEDERAL LABOR LAW GUARANTEES EMPLOYERS AND UNIONS THE RIGHT TO ENGAGE IN COLLECTIVE BARGAINING FREE FROM STATE INTERFERENCE.

This case, as the First Circuit noted, involves "the first occasion on which a federal court has considered a confrontation between the national policy of free collective bargaining and the administration of a state's welfare law" (App. A. p. A3, A4).[3] By upholding state payment of welfare benefits to economic strikers, the First Circuit has permitted Massachusetts to interfere with the process of free collective bargaining by directly subsidizing the exercise of one party's economic weapons.

National labor law is predicated on free collective bargaining. *H. K. Porter Co.* v. *NLRB,* 397 U. S. 99, 108 (1970); *NLRB* v. *American National Insurance,* 343 U. S. 395 (1952). The core of this process is the right to strike. *Division 1287, Amalgamated Assn. of Street Electrical*

2. The order of the District Court was taken after a full presentation by both parties, had the effect of a denial of an injunction, and is therefore properly before this Court for review. See, *United States* v. *Cities Service Co.,* 410 F. 2d 662 (1st Cir. 1969); *Dikworth* v. *River,* 343 F. 2d 226 (5th Cir. 1965).

3. Similar issues have been raised in state court proceedings: *Lascaris* v. *Wyman,* 305 N. Y. S. 2d 212 (N. Y. Sup. Ct. 1969); and *Strat-O-Seal Mfg. Co.* v. *Scott,* 72 Ill. App. 2d 480, 218 N. E. 2d 227 (Ill. App. 1966).

*Railway & Motor Coach Employees of America* v. *State of Missouri,* 374 U. S. 74, 81 (1963). Congress and this Court have recognized that economic weapons are inherent in the collective bargaining process. *NLRB* v. *Insurance Agents Union,* 361 U. S. 477 (1960); *American Ship Building* v. *NLRB,* 380 U. S. 300 (1965). As noted in *Insurance Agents,* "the presence of economic weapons in reserve, and their actual exercise on occasion . . . is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized." *NLRB* v. *Insurance Agents Union,* 361 U. S. at 489.

The recognition that the presence of economic weapons is inherent to our system of free collective bargaining requires the corollary recognition that government intervention in this area is prohibited. This Court has recognized on numerous occasions that Congress left employers and unions free "to establish, through collective negotiations their own charter for the ordering of industrial relations" and that any interference with this process must be rejected. *Local 24, International Brotherhood of Teamsters* v. *Oliver,* 358 U. S. 283, 295 (1959).

In *Insurance Agents,* for example, this Court struck down an attempt to interfere with the collective bargaining process through the regulation of one party's exercise of its economic weapons. Justice Brennan stated:

> ". . . [I]f the Board could regulate the choice of economic weapons that may be used as part of collective bargaining, it would be in a position to exercise considerable influence upon the substantive terms on which the parties contract. . . . Our labor policy is not presently erected on a foundation of government control of the results of negotiations. See S. Rep. No. 105, 80th Cong. 1st Sess., p. 2. Nor does it contain a charter for . . . equalizing disparities of bargaining power between employer and union." 361 U. S. at 490.

To the same effect is this Court's declaration in *American Ship Building* that the NLRB may not "assess the relative economic power of the adversaries in the bargaining process and . . . deny weapons to one party or the other because of its assessment of that party's bargaining power." 380 U. S. at 317.

The availability of welfare benefits to economic strikers gives a union a potent weapon that impairs "the desired bilateral freedom of collective bargaining, left free by Congress." *John Hancock Mutual Life Insurance Company* v. *Commissioner of Insurance*, 349 Mass. 390, 208 N. E. 2d 516, 524-525 (1965). By providing welfare benefits to economic strikers, Massachusetts helps a union insist on its position with significantly less economic disadvantage to its members. Yet, as this Court has noted, "the right to bargain collectively does not entail any 'right' to insist on one's position free from economic disadvantage." *American Ship Building Co.* v. *NLRB*, 380 U. S. at 309.

Surely the type of assistance Massachusetts provided the strikers of ITT in this case involve more than what the First Circuit described as a "tangential frustration of the national policy objective of unfettered collective bargaining." (App. A. p. A5.) Welfare payments, as President Nixon has noted, have a direct impact on the collective bargaining process.[4] They may prolong strikes by permitting strikers to withstand the economic disadvantages of the

4. Recognizing the imbalance created in collective bargaining by granting strikers economic assistance, the President made the following recommendation to Congress in light of the recent railroad labor dispute:

> "In addition, *and in order to move toward a balancing of economic pressures,* I am proposing a suspension of employment benefits for striking railroad employees, thus, moving toward an *equalization* of the economic pressures of such a strike." (Emphasis added.)

32 DLR E-I, 2(2-17-71)

strike. Welfare benefits to strikers, according to a leading union spokesman, were "one of the key contributions" to the success of the strike against General Electric.[5] Indeed, Massachusetts alone provided $2,307,823 in welfare benefits to over five thousand General Electric strikers.[6]

The potential impact on collective bargaining and the economy is staggering.[7] Rather than a system where the economic strength of the parties will influence the terms of an agreement, there will be a system where the strength of one of the parties is to a large extent based on state aid. Such a system is directly contrary to the concept that while the government "acts to oversee and referee the process of collective bargaining," it "leaves the results of the contest to the bargaining strength of the parties." *H. K. Porter Co.* v. *NLRB*, 397 U. S. at 107-8.

## II. THE PAYMENT OF WELFARE BENEFITS TO ECONOMIC STRIKERS INTRUDES INTO AN AREA CONGRESS HAS OCCUPIED TO THE FULL EXTENT OF ITS CONSTITUTIONAL POWER.

This case does not fall under the principles established by this Court in *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959), as the Court below recognized (App. A, p. A5). *Garmon* and its progeny deal primarily with the problem of primary jurisdiction, i.e., the jurisdiction of states over matters "arguably subject" to the jurisdiction of the National Labor Relations Board. Unlike

5. Compton, "Victory at GE: How It Was Done," *The American Federationist*, July, 1970, p. 6.

6. Statement of Joseph W. Chamberlin, Director of Research Massachusetts Department of Public Welfare, reprinted in North Adams Transcript, February 4, 1970.

7. The Bureau of Labor Statistics reported that in 1970 the man-days lost because of strikes rose to 62 million, an increase of over 19 million from 1969 and the number of workers involved rose from 2,481,000 in 1969 to 3,300,000 in 1970. 6 DLR (January 11, 1971) at p. B-1, 2.

*Garmon*, this case does not involve the question of National Labor Relations Board jurisdiction, but the far different issue of whether a state can act in an area which Congress has occupied "to the full extent of its constitutional power." *Amalgamated Assn. of Street Electrical Railway & Motor Coach Employees of America* v. *Wisconsin Employment Relations Board*, 340 U. S. 383, 391 (1951).

The area of collective bargaining, with the strike at its core, is an area that Congress has occupied to the full extent of its constitutional power. This Court has on numerous occasions struck down state intrusion into this area of federal preeminence.

In *International Union of United Automobile, Aircraft and Agricultural Implement Workers of America* v. *O'Brien*, 339 U. S. 454 (1950), this Court invalidated a Michigan law relating to economic strikes on the ground that *"Congress occupied this field and closed it to state regulation."* (Emphasis added.)

Similarly, in *Local 24, International Brotherhood of Teamsters* v. *Oliver, supra*, this Court refused to apply an Ohio antitrust law to a provision in a collective bargaining agreement:

> "Since the federal law operates here, in an area [collective bargaining] where its authority is paramount, to leave the parties free, the inconsistent application of state law is necessarily outside the power of the State." 358 U. S. at 296.

In *John Hancock Mutual Life Insurance Co.* v. *Commissioner of Insurance*, 349 Mass. 390, 208 N. E. 2d 516 (1965), the Supreme Judicial Court of Massachusetts recognized the full extent to which Congress has occupied this field. Striking down a statute permitting owners of debit life insurance policies an additional grace period in the event

of a strike by an insurance company's collecting agents, the Court stated:

> "The legislation under consideration . . . gives the union a potent weapon which cannot fail unilaterally to restrict the desired bilateral freedom of collective bargaining, left free by Congress for the operation of economic forces. For the state to intrude into such an area designed to be kept free is as much a violation of Federal policy as it is for a state to attempt to regulate rights or duties specifically protected by the federal acts." *Id.* at 524-525.[8]

Allowing the payment of welfare benefits to economic strikers similarly disrupts the system of private ordering through free collective bargaining which Congress intended to be free from state interference. The payment of welfare benefits to economic strikers necessarily affects the balance of power in collective bargaining. As stated by Professor Archibald Cox, "any state law which affects [this] balance is inconsistent with the national labor policy embodied in the LMRA, and under the supremacy clause, cannot be applied in situations affecting interstate commerce. Cox, *Labor Decisions of the Supreme Court at the October Term, 1957*, 44 Va. L. Rev. 1057, 1069 (1968).[9]

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8. Other decisions demonstrating the limits on state jurisdiction over labor relations matters are: *Nash* v. *Florida Industrial Commission*, 398 U. S. 235 (1967); *Weber* v. *Anheuser-Busch*, 384 U. S. 468 (1955); *General Electric* v. *Callahon*, 294 F. 2d 60 (1st Cir. 1961).

9. The fact that the interference with collective bargaining comes about through the application of a state welfare statute rather than a statute expressly covering labor relations does not excuse its intrusion into this area. As this Court has stated, the "test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives." *Florida Lime and Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142 (1963).

## III. PAYMENT OF WELFARE BENEFITS TO ECONOMIC STRIKERS PURSUANT TO THE AID TO FAMILIES WITH DEPENDENT CHILDREN STATUTE IS CONTRARY TO THE INTENT OF CONGRESS.

Throughout the AFDC Act, it becomes evident that Congress intended to provide public assistance for individuals who, through no fault of their own, are unemployed and unable to support themselves or their families. Nowhere in either the federal or Massachusetts statutes concerning aid to dependent children of the unemployed (AFDC), or in the Massachusetts general assistance program, is there the slightest indication of an intent to make such aid or assistance available to persons whose need arises solely because of their or their parents' participation in a strike arising out of a labor dispute. On the contrary, the stated purposes of the Acts indicate that a primary goal of each is to encourage those persons who, through no fault of their own, have become unemployed to become self-sufficient. 42 U. S. C. § 607; Mass G. L. c. 117, 118. *Report of Senate Committee on Finance on ADC Benefits to Children of Unemployed Parents*, 87th Cong. 1st Sess. (1961, Rept. No. 165); *Hearings on H. R. 12080 Before the Senate Committee on Finance*, 90th Cong. 1st Sess. (1967), p. 264.

The entire thrust of the legislative history demonstrates that Congress had a two-fold purpose in providing AFDC benefits to children of unemployed fathers. One purpose was to provide aid to these families, while the second purpose, underlying the first, was to provide aid to individuals who would be attempting to secure employment during the time that aid was being granted. *Report of Senate Committee on Finance on ADC Benefits to Children of Unemployed Parents*, 87th Cong. 1st Sess. (1961, Rept. No. 165). Congress was attempting to provide aid to individuals who are involuntarily unemployed. And as Presi-

dent Nixon stated to Congress on July 8, 1969, "a worker who exercises his right to strike is not involuntarily unemployed." 115 Cong. Rec. 18537.

In its opinion, the First Circuit noted that while it did not attribute heavy weight to Congressional silence, it did consider silence significant "where a legislature has shown its capacity to speak" on an issue. Congress has, however, demonstrated that when it seeks to provide benefits to strikers it does so expressly. For example, the Food Stamp Act[10] expressly provides that it is not a refusal to accept employment to refuse to work at a plant during a strike.[11] No such provision is contained in the AFDC Act.

## CONCLUSION.

On the basis of all the foregoing, Petitioner submits that the Court grant this Petition for Writ of Certiorari.

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10. Public Law 91-671, 84 Stat. 2048 (1971).

11. The amendments to the Food Stamp Act provide that "refusal to work at a plant or site subject to a strike or a lockout for the duration of such strike or lockout shall not be deemed to be a refusal to accept employment". 7 U. S. C. A. § 2014(c).

# APPENDIX A.

UNITED STATES COURT OF APPEALS

For the First Circuit.

No. 7720

ITT LAMP DIVISION OF THE INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION,

*Plaintiff, Appellant,*

*v.*

STEPHEN A. MINTER, COMMISSIONER OF THE MASSACHUSETTS DEPARTMENT OF PUBLIC WELFARE,

*Defendant, Appellee.*

No. 7749

MAURICE CONCRETE PRODUCTS, INC.,

*Plaintiff, Appellant,*

*v.*

STEPHEN A. MINTER, COMMISSIONER OF THE MASSACHUSETTS DEPARTMENT OF PUBLIC WELFARE,

*Defendant, Appellee.*

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge,*
McENTREE AND COFFIN, *Circuit Judges.*

## OPINION OF THE COURT.

December 14, 1970.

COFFIN, *Circuit Judge.* These two cases,[1] combined for purposes of appeal, present the question whether the defendant Commissioner of the Massachusetts Department of Public Welfare is wrongfully intruding in a labor dispute by making available welfare benefits to strikers who otherwise qualify under Massachusetts statutes providing for General Welfare and Aid to Families with Dependent Children, Mass. G. L. c. 117 and 118. Plaintiffs claim that such state action alters the relative economic strength of the parties, thus entering a field preempted by the national policy guaranteeing free collective bargaining, in violation of the Supremacy Clause of the Constitution. Plaintiffs' motions for injunctive relief were denied, the district court finding no evidence of irreparable injury and no reasonable probability of success on the merits.[2] Although the strike against ITT was subsequently settled, the issue, we know from our own experience, has earlier vainly sought appellate review in this circuit and is likely again to be raised, bringing it close to the "recurring question" category, where significant public rights are involved and court review ought not, if possible, be avoided. *See So. Pac. Terminal Co. I. C. C. 219 U. S.* 498, 515-516 (1911) and *Marchand* v. *Director, U. S. Probation Office,* 421 F. 2d 331

1. Brought separately by the ITT Lamp Division of the International Telephone and Telegraph Corporation and Maurice Concrete Products, Inc.

2. The action of the court, though in response to a motion for temporary restraining order, was taken after a full presentation by both parties, *Austin* v. *Altman,* 332 F. 2d 273, 275 (2d Cir. 1964), and had the effect of a denial of an injunction, *see United States* v. *Cities Service Co.,* 410 F. 2d 662, 663 n. 1 (1st Cir. 1969), and is therefore appealable.

(1970). In any event, however, the appeal of Maurice Concrete presents the identical question.

Plaintiffs have not contended in their brief that the district court erred in finding that there was "no evidence to show to what extent the receipt of welfare payments will affect the continuation of the strike" but have based their claim of irreparable injury on the alleged interference with collective bargaining constituted by the present and prospective payments of welfare benefits.[3] Since at least one of the appeals presents a case where a substantial number of strikers might possibly have qualified for welfare, we prefer to accept plaintiffs' assumption that the issue of irreparable harm merges into and becomes indistinguishable from the issue of probable success on the merits. That is to say that if indeed it is probable that the present and prospective provision of welfare to indigent strikers would be held to frustrate the collective bargaining process, it is equally probable that irreparable injury would be suffered.

We therefore move to the question whether plaintiffs have demonstrated sufficient probability of prevailing on the merits. *Automatic Radio Mfg. Co.* v. *Ford Motor Co.*, 390 F. 2d 113, 115-116 (1st Cir.), *cert. denied*, 391 U. S. 914 (1968). So far as our research indicates, this is the first occasion on which a federal court has considered a confrontation between the national policy of free collective bar-

3. If plaintiffs' approach is not correct, they, in any case, have surely not established irreparable injury. Our record is almost bereft of any indication of significant impact on either plaintiff. In the ITT case, apparently 175 or about 25% of 660 striking employees had applied for welfare. In the Maurice Concrete case we have only the contrary assertions of counsel at argument that (1) a majority of 25 workers were receiving welfare and (2) only one worker was on welfare, and he because he was hit by a truck. There is no evidence of any relationship between the availability of welfare benefits to present or prospective striker recipients and the likelihod of prolongation of either strike.

approach to preemption followed by the Supreme Court, in which both the degree of conflict and the relative importance of the federal and state interests are assessed. Note, *Federal Preemption: Governmental Interests and the Role of the Supreme Court,* Duke L. J. 484, 510, 511 (1966). Where Congress has not clearly manifested its purpose to exclude state action which takes the form of exercise of its historic police powers, such state action will not be invalidated under the Supremacy Clause, "in the absence of persuasive reasons", *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142 (1963), or unless the administration of the state law "palpably infringes" upon the federal policy. *Southern Pac. Co.* v. *Arizona ex rel. Sullivan*, 325 U. S. 761, 766 (1945). *See also Head* v. *New Mexico Bd. of Examiners*, 374 U. S. 424 (1963); *Buck* v. *California*, 343 U. S. 99 (1952)[8]

On neither count—the issue of extent of conflict or the relative strength of the federal and state interests—would we fell confident in any *a priori* judgment. A court would first have to determine the quantum of impact on collective bargaining stemming from the granting of welfare benefits to strikers. If this is found substantial a court would then have to weigh the impact on the state of declaring needy strikers and their families ineligible for welfare against the extent to which making them eligible stripped state government of its neutrality in a labor-management dispute.

Such weighing exercises could not be restricted to an

8. *Garmon* itself applies, within its area, the general approach, recognizing that on any issue of arguable conflict with sections 7 and 8, state action would nevertheless be tolerated where "the activity regulated [is] a merely peripheral concern of the Labor Management Relations Act", 359 U. S. at 243, "[o]r where the regulated conduct touche[s] interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." 359 U. S. at 244.

ad hoc exploration of the microcosm of these particular disputes. A court must deal with "classes of situations" and not "judgments on the impact of particular conflicts on the entire scheme of federal labor policy and administration", *Garmon, supra* at 242. Under such an approach, a court would be interested in how many states permit strikers to receive welfare; whether or not strikes tend to be of longer duration where welfare is received; and studies or expert testimony evaluating the impact of eligibility for benefits on the strikers' resolve; a comparison between strike benefits and welfare benefits; the impact of the requirement that welfare recipients accept suitable employment; how many strikers actually do receive welfare benefits; and a host of other factors. In addition, the state's legitimate interests must also be considered: its interests in minimizing hardship to families of strikers who have no other resources than the weekly pay check, its concern in avoiding conditions that could lead to violence, its interest in forestalling economic stagnation in local communities, etc.[9]

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9. We note that there may arise non-*Garmon* labor relations situations where the conflict between federal and state interests and their relative importance would be so clear as to render such an extended empirical exploration unnecessary. The Massachusetts Supreme Judicial Court considered such to be the case in *John Hancock Life Ins. Co.* v. *Comm. of Insurance*, 349 Mass. 390 (1965). In that decision the court invalidated a state statute protecting insurance policy holders by declaring a moratorium on the obligation to prepay premiums during a strike and a 31-day period following its termination. The court found, on the one hand, that this law "tips the balance in favor of the [striking] agents in any labor dispute" with an insurance company, 349 Mass. at 403, by depriving the employer of assets and actuarial data vital to its business, and by effectively frustrating the employer's right to replace workers who have struck. Moreover, the statute denies to non-striking agents their right ot refrain from concerted activities. On the other hand, the court noted that the "harm sought to be averted by this exercise of the police power does not clearly appear." 349 Mass. at 404.

This very catalogue of data relevant to a macrocosmic weighing, which a court, if called upon, would have to undertake, indicates the preferable forum to be the Congress. Congress would be particularly appropirate in resolving this issue. The activity allegedly intruding into federal labor policy is not solely a state activity but rather a joint state-federal program. Congress has established the minimal requirements with which participating state welfare plans must comply. 42 U. S. C. § 60, *et seq.* We do not attribute heavy weight to Congressional silence, but we would doubt that, if striker eligibility for welfare had a significant impact on labor-management relations, Congress would be unaware of that impact. Moreover, if the issue proves to be finely balanced, after weighing all the evidence, it may be a sufficient justification for upholding the state action that Congress is always free to provide specifically for preemption. *See Penn Dairies* v. *Milk Control Comm'n,* 318 U. S. 261, 275 (1943).

In sum, wholly apart from the inadequacy of the evidence before the district court, we have substantial doubt that a significant frustration of federal collective bargaining policy is effected by the granting of welfare benefits to indigent strikers or that, even so, the state interest is so insubstantial compared to the federal interest that Congress must be supposed to have deprived the state of such power to serve that interest. We accordingly hold that the district court did not err in concluding that plaintiffs' case did not have a sufficient probability of prevailing on the merits.

There remains for our consideration plaintiffs' contention that the granting of welfare benefits to strikers violates the provisions of the Massachusetts Welfare Statutes and its federal counterpart, in that strikers, having voluntarily left their jobs, are persons who have "without good cause . . . refused a bona fide offer of employment. . . ."

42 U. S. C. § 607(b)(1).[10] Plaintiffs tend in their argument to assume the very point in issue by equating a refusal to work with "fault" and absence of "good cause". But this is no less circular or more persuasive than the contrary assumption of the defendant, accepted by the district court, that exercising one's federally protected right to strike constitutes "good cause" to refuse employment.[11] And the federal scheme, as plaintiffs' reference to the Senate Finance Committee's Report makes clear, allows the state, without of course deciding the merits of a particular controversy, to make the determination of what is covered by "good cause", and what constitutes a "bona fide" offer of employment. Senate Committee on Finance, Rep. No. 165, 87th Cong., 1st Sess. p. 3 (1961), U. S. C. Cong. & Admin. News 1716, 1718.

The fact that the Massachusetts legislature has specifically made unemployment compensation unavailable to workers on strike, Mass. G. L. c. 151A, § 25, does not cast doubt on the Commissioner's determination. We observe first that welfare programs, supplying unmet subsistence needs to families without time limitation, address a more basic social need than does unemployment compensation, which attempts to cushion the shock of seasonal, cyclical, or technological unemployment by making available time-limited benefits to individual workers, varying in relation to their prior earnings and without reference to demon-

10. The complementary Massachusetts statute likewise renders a person ineligible if he "wilfully fails without good cause, as determined by the [welfare] department, to maintain his registration for work . . . or to accept a referral to or offer of suitable employment", Mass. G. L. c. 117, § 1B.

11. The middle ground, qualifying for welfare on a case-by-case basis only those strikers who are engaged in a "reasonable" strike, is almost unthinkable, necessarily requiring the Commissioner of Welfare to take sides in every labor dispute, an activity which we held impermissible in *General Electric* v. *Callahan*, 294 F. 2d 60 (1st Cir. 1961), *appeal dismissed*, 369 U. S. 832 (1962).

strated need. Secondly, we would not lightly expand the legislature's expressed negative in one piece of legislation to constitute an unexpressed proviso in another. Indeed silence on an issue where a legislature has shown its capacity to speak is all the more significant.

Plaintiffs' further reference to the legislative history behind the federal enactment is not particularly helpful. The passages they quote do support the proposition, which the court accepts, that welfare programs were not designed to aid those who do not seek employment. But strikers who receive benefits fully conform to this legislative intention, since, as we noted above, all recipients, strikers included, must register and accept available alternate work under Mass. G. L. c. 117, § 1B. Furthermore, the legislative history neither states, nor can be read to imply that strikers, as a group, are to be held ineligible for welfare benefits if they meet all qualifications set by the state.

In sum, therefore, we cannot say, as a matter of probability, that the Commissioner's administrative determination of striker eligibility for welfare is precluded by the relevant state or federal statutes.

*Affirmed.*

## APPENDIX B.

UNITED STATES COURT OF APPEALS

For the First Circuit

No. 7720.

ITT Lamp Division of the International Telephone and Telegraph Corporation,

*Plaintiff, Appellant,*

*vs.*

Stephen A. Minter, Commissioner of the Massachusetts Department of Public Welfare,

*Defendant, Appellee.*

JUDGMENT.

Entered: December 14, 1970.

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the district court is affirmed.

By the Court:

/s/ Dana H. Gallup,
*Clerk.*

Enter:

Aldrich, *Ch. J*

## APPENDIX C.

UNITED STATES DISTRICT COURT

District of Massachusetts

| | |
|---|---|
| ITT Lamp Division of the International Telephone and Telegraph Corporation,<br>*vs.*<br>Stephen A. Minter, Commissioner of the Massachusetts Department of Public Welfare. | Civil Action No. 70-1265-C. |

MEMORANDUM OF OPINION ON MOTION FOR A TEMPORARY RESTRAINING ORDER.

September 30, 1970

FORD, *D. J.*

The plaintiff in this action for injunctive relief is a Delaware corporation engaged in interstate commerce. Since August 24, 1970 employees of plaintiff's Lynn plant, members of Truck Drivers, Chauffeurs, Helpers Local No. 42, have been on strike.

Some of the striking employees have applied for assistance and welfare benefits under Massachusetts G. L. Chapter 117 and 118. Defendant, who administers such benefits, has found certain applicants eligible and is ready to make payments of benefits to them. The case has been heard on plaintiff's motion for an order temporarily restraining defendant from making such payments.

Before a temporary restraining order can issue, plaintiff must show that it has a reasonable probability of prevailing on the merits after a full hearing of the case. Consequently, the court, without purporting to decide the issues finally, must consider the contentions of plaintiff.

Plaintiff argues that the making of welfare payments to striking workers amounts to an interference by the state with its right under the Labor Management Relations Act, 29 U. S. C. § 141, et seq. to engage freely in collective bargaining, and hence that under the doctrine of preemption the state is barred from granting such assistance. Even assuming that welfare assistance to striking workers may tend to give the strikers some advantage, the state here does not purport to intervene directly in any matter involving labor management relations. It is acting under an entirely separate program of providing for its citizens who are in need, a matter of vital state interest, and one in which the policy nad operation of the state program is closely coordinated with another federal statute providing for aid to families with dependent children, 42 U. S. C. § 601, et seq., under which the federal government provides a substantial part of the cost of the benefits furnished. Any effect this program may have on a particular labor-management dispute is indirect and peripheral. The court is not convinced that it would finally be held barred under the preemption doctrine.

Plaintiff further argues that the granting of benefits violates the Massachusetts statutes and the related federal statute, 42 U. S. C. § 601, et seq. It is argued that the strikers here (and their families) are not eligible because by striking they have voluntarily left their jobs and hence are persons who have "without good cause . . . refused a bona fide offer of employment." However, this is not a simple refusal to work. These workers in striking are engaged in a rightful activity which is legally protected by

various provisions of the Labor Management Relations Act. Again the court is not persuaded that one who exercises his legally protected right to strike is thereby refusing without good cause to accept offered employment. Moreover, the possible consequences to a union member of returning to work as a strike breaker may well constitute good cause for failing to return to work.

Plaintiff argues that because striking workers are not eligible for unemployment insurance benefits, they should equally be barred from welfare benefits. However, the legislature expressly included this ban in the unemployment insurance act, Mass. G. L. Ch. 151A, § 25. If any conclusion is to be drawn from the complete absence of such a provision in the welfare statutes, it would be that the legislature did not intend to apply any such ban to welfare payments.

Plaintiff has presented evidence to show that it is suffering substantial and irreparable damage from a continuance of the strike. Assuming it is suffering such damage, there is no evidence to show to what extent the receipt of welfare payments will affect the continuance of the strike. It is thus uncertain to what extent or how soon the granting of a temporary restraining order will avert further harm to plaintiff. On the other hand the granting of the order will harm the defendant and the state by interfering with their public interest in providing needed relief for the destitute. Moreover, it will inflict serious harm on the needy applicants and their families. Welfare recipients should not be denied the benefits of the welfare system until a determination after full hearing that they are not entitled to them. *Goldberg* v. *Kelly,* 397 U. S. 254.

The motion for a temporary restraining order is denied.

## APPENDIX D.

### United States Constitution.

ARTICLE VI.

**Clause 2. Supreme Law of Land.**

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

## APPENDIX E.

### Massachusetts General Assistance Statute.

Chapter 117.

Support by the Commonwealth.

**§ 1. Commonwealth to Support Poor; What Aid To Be Furnished.**

The commonwealth, acting by and through the department of public welfare, shall relieve and support all poor and indigent persons residing or found therein, whenever they stand in need of relief or support. The aid furnished shall include financial, social and medical assistance or aid as indicated by the circumstances and shall be sufficient to enable parents to bring up their children properly and to maintain an adequate standard of living for persons or families or children and shall be in an amount to be de-

termined in accordance with budgetary standards of the department and shall be granted from the date of application therefor.

**§ 1B. Certain Male Applicants for Assistance To Be Registered at Local Employment Office, etc.**

If the applicant is a male between the ages of eighteen and sixty-two years, the department shall require that said applicant submit, with his application for aid or assistance, evidence from the division of employment security that said applicant has registered for work at a local employment office of the division.

No person shall be eligible for aid or assistance under this chapter who willfully fails without good cause, as determined by the department, to maintain his registration for work as provided in the first paragraph of this section or to accept a referral to or offer of suitable employment. He shall be required to report to the department information with respect to any job to which he has been referred. The department shall, not less frequently than once every three months, request verification from the division of employment security of an applicant's record with that agency.

This section shall not prevent the department, in its discretion, from giving prompt and suitable temporary aid pending compliance with the requirements of this section. No individual shall be considered ineligible for aid or assistance because of failure to comply with the provisions of this section, if such failure is due to illness or disability. In no event shall such failure affect the eligibility of minor children for assistance under this chapter.

No recipient of assistance under chapter one hundred and eighteen A or one hundred and eighteen D, or female recipients of assistance with dependent children under high school age, shall be subject to the provisions of this section.

## Massachusetts Aid to Families With Dependent Children Statute.

CHAPTER 118.

Aid to Families With Dependent Children.

### § 1. Definitions.

The followig words and phrases as used in this chapter, unless the context otherwise requires, shall have the following meanings:—

"Dependent child", a needy child who has been deprived of parental support or care by reason of the death, continued absence from the home, physical or mental incapacity or the unemployment of a parent, and who is living with his father, mother or other parent in a place of residence maintained by one or more of such relatives as his or their own home and who is under the age of eighteen or under the age of twenty-one and a student regularly attending a school, college or university or regularly attending a course of vocational or technical training designed to fit him for gainful employment.

"Parent", shall include, in addition to the father and mother of the dependent child, the following:—stepfather, stepmother, stepbrother, stepsister; and blood relative, including those of the half blood, except cousins who are more distantly related than first cousins; adoptive relative of equal propinquity to the foregoing; and spouses of any such persons.

"Aid to families with dependent children", money payments with respect to families with a dependent child or children.

"Department", the department of public welfare.

**§ 2. Department of Public Welfare to Furnish Aid to Parents With Dependent Children.**

The department shall aid a parent in properly bringing up, in his or her own home, each dependent child but no aid shall be granted under this chapter for or on account of any child unless such child resides in the commonwealth. The aid furnished shall be sufficient to enable such parent to bring up such child or children properly in his or her own home, and shall be in amount to be determined in accordance with budgetary standards of the department, and shall be granted from the date of application therefor. Such assistance shall be paid by cash or in check and shall be paid semimonthly in advance unless the applicant prefers less frequent payments. The amount of such assistance shall not be reduced by the amount of any payment for support due from an absent parent through a court order or otherwise, but said payment from the absent parent shall be made to the department in accordance with section twenty-seven of chapter thirty.

* * * * *

**Social Security of 1935, as Amended—Title 42.**

**§ 602. State Plans for Aid and Services to Needy Families With Children; Contents; Approval by Secretary.**

(a) A State plan for aid and services to needy families with children must (1) provide that it shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them; (2) provide for financial participation by the State; (3) either provide for the establishment or designation of a single State agency to administer the plan, or provide for the establishment or designation of a single State agency to supervise the administration of the plan; (4) provide for granting an

opportunity for a fair hearing before the State agency to any individual whose claim for aid to families with dependent children is denied or is not acted upon with reasonable promptness; (5) provide (A) such methods of administration (including after January 1, 1940, methods relating to the establishment and maintenance of personnel standards on a merit basis, except that the Secretary shall exercise no authority with respect to the selection, tenure of office, and compensation of any individual employed in accordance with such methods) as are found by the Secretary to be necessary for the proper and efficient operation of the plan, and (B) for the training and effective use of paid subprofessional staff, with particular emphasis on the full-time or part-time employment of recipients and other persons of low income, as community services aides, in the administration of the plan and for the use of nonpaid or partially paid volunteers in a social service volunteer program in providing services to applicants and recipients and in assisting any advisory committees established by the State agency; and (6) provide that the State agency will make such reports, in such form and containing such information, as the Secretary may from time to time require, and comply with such provisions as the Secretary may from time to time find necessary to assure the correctness and verification of such reports; (7) except as may be otherwise provided in clause (8), provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income; (8) provide that, in making the determination under clause (7), the State agency—

(A) shall with respect to any month disregard—

(i) all of the earned income of each dependent child receiving aid to families with dependent children who is (as determined by the State in accordance with standards prescribed by the Secretary) a full-time student or part-time student who is not a full-time employee attending a school, college, or university, or a course of vocational or technical training designed to fit him for gainful employment, and

(ii) in the case of earned income of a dependent child not included under clause (i), a relative receiving such aid, and any other individual (living in the same home as such relative and child) whose needs are taken into account in making such determination, the first $30 of the total of such earned income for such month plus one-third of the remainder of such income for such month (except that the provisions of this clause (ii) shall not apply to earned income derived from participation on a project maintained under the programs established by section 632(b) (2) and (3) of this title); and

(B) (i) may, subject to the limitations prescribed by the Secretary, permit all or any portion of the earned or other income to be set aside for future identifiable needs of a dependent child, and (ii) may, before disregarding the amounts referred to in subparagraph (A) and clause (i) of this subparagraph, disregard not more than $5 per month of any income;

except that, with respect to any month, the State agency shall not disregard any earned income (other than income referred to in subparagraph (B)) of—

(C) any one of the persons specified in clause (ii) of subparagraph (A) if such person—

(i) terminated his employment or reduced his earned income without good cause within such period (of not less than 30 days) preceding such month as may be prescribed by the Secretary; or

(ii) refused without good cause, within such period preceding such month as may be prescribed by the Secretary, to accept employment in which he is able to engage which is offered through the public employment offices of the State, or is otherwise offered by an employer if the offer of such employer is determined by the State or local agency administering the State plan, after notification by him, to be a bona fide offer of employment; or

(D) any of such persons specified in clause (ii) of subparagraph (A) if with respect to such month the income of the persons so specified (within the meaning of clause (7)) was in excess of their need as determined by the State agency pursuant to clause (7) (without regard to clause (8)), unless, for any one of the four months preceding such month, the needs of such persons were met by the furnishing of aid under the plan;

* * * * *

**§ 606. Definitions.**

When used in this part—

(a) The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment;

(b) The term "aid to families with dependent children" means money payments with respect to, or (if provided in or after the third month before the month in which the recipient makes application for aid) medical care in behalf of any type of remedial care recognized under State law in behalf of, a dependent child or dependent children, and includes (1) money payments or medical care or any type of remedial care recognized under State law to meet the needs of the relative with whom any dependent child is living (and the spouse of such relative if living with him and if such relative is the child's parent and the child is a dependent child by reason of the physical or mental incapacity of a parent or is a dependent child under section 607 of this title), and (2) payments with respect to any dependent child (including payments to meet the needs of the relative, and the relative's spouse, with whom such child is living, and the needs of any other individual living in the same home if such needs are taken into account in making the determination under section 602(a)(7) of this title) which do not meet the preceding requirements of this subsection, but which would meet such requirements except that such payments are made to another individual who (as determined in accordance with standards prescribed by the Secretary) is interested in or concerned with the welfare of such child or relative, or are made on behalf of such child or relative directly to a person furnishing food, living accommodations, or other goods, services, or items to or for such child, relative, or other individual, but only with respect to a State whose State plan approved under section 602 of this title includes provision for—

(A) determination by the State agency that the relative of the child with respect to whom such payments are made has such inability to manage funds that making payments to him would be contrary to the welfare of the child and, therefore, it is necessary to

provide such aid with respect to such child and relative through payments described in this clause (2);

(B) undertaking and continuing special efforts to develop greater ability on the part of the relative to manage funds in such manner as to protect the welfare of the family;

(C) periodic review by such State agency of the determination under clause (A) to ascertain whether conditions justifying such determination still exist, with provision for termination of such payments if they do not and for seeking judicial appointment of a guardian or other legal representative, as described in section 1311 of this title, if and when it appears that the need for such payments is continuing, or is likely to continue, beyond a period specified by the Secretary;

(D) aid in the form of foster home care in behalf of children described in section 608(a) of this title; and

(E) opportunity for a fair hearing before the State agency on the determination referred to in clause (A) for any individual with respect to whom it is made;

(c) The term "relative with whom any dependent child is living" means the individual who is one of the relatives specified in subsection (a) of this section and with whom such child is living (within the meaning of such subsection) in a place of residence maintained by such individual (himself or together with any one or more of the other relatives so specified) as his (or their) own home.

(d) The term "family services" means services to a family or any member thereof for the purpose of preserving, rehabilitating, reuniting, or strengthening the family, and such other services as will assist members of a family to attain or retain capability for the maximum self-support and personal independence.

(e) (1) The term "emergency assistance to needy families with children" means any of the following, furnished for a period not in excess of 30 days in any 12-month period,

in the case of a needy child under the age 21 who is (or, within such period as may be specified by the Secretary, has been) living with any of the relatives specified in subsection (a) (1) of this section in a place of residence maintained by one or more of such relatives as his or their own home, but only where such child is without available resources, the payments, care, or services involved are necessary to avoid destitution of such child or to provide living arrangements in a home for such child, and such destitution or need for living arrangements did not arise because such child or relative refused without good cause to accept employment or training for employment—

(A) money payments, payments in kind, or such other payments as the State agency may specify with respect to, or medical care or any other type of remedial care recognized under State law on behalf of, such child or any other member of the household in which he is living, and

(B) such services as may be specified by the Secretary; but only with respect to a State whose State plan approved under section 602 of this title includes provision for such assistance.

(2) Emergency assistance as authorized under paragraph (1) may be provided under the conditions specified in such paragraph to migrant workers with families in the State or in such part or parts thereof as the State shall designate.

**§ 607. Dependent Children of Unemployed Fathers; Definition.**

(a) The term "dependent child" shall, notwithstanding section 606(a) of this title, include a needy child who meets the requirements of section 606(a) (2) of this title, who has been deprived of parental support or care by reason of the unemployment (as determined in accordance with

standards prescribed by the Secretary) of his father, and who is living with any of the relatives specified in section 606(a) (1) of this title in a place of residence maintained by one or more of such relatives as his (or their) own home.

(b) The provisions of subsection (a) of this section shall be applicable to a State if the State's plan approved under section 602 of this title—

(1) requires the payment of aid to families with dependent children with respect to a dependent child as defined in subsection (a) of this section when—

(A) such child's father has not been employed (as determined in accordance with standards prescribed by the Secretary) for at least 30 days prior to the receipt of such aid,

(B) such father has not without good cause, within such period (of not less than 30 days) as may be prescribed by the Secretary, refused a bona fide offer of employment or training for employment, and

(C) (i) such father has 6 or more quarters of work (as defined in subsection (d) (1) of this section) in any 13-calendar-quarter period ending within one year prior to the application for such aid or (ii) he received unemployment compensation under an unemployment compensation law of a State or of the United States, or he was qualified (within the meaning of subsection (d) (3) of this section) for unemployment compensation under the unemployment compensation law of the State, within one year prior to the application for such aid; and

(2) provides—

(A) for such assurances as will satisfy the Secretary that fathers of dependent children as defined in subsection (a) of this section will be referred to the Secretary of Labor as provided in section 602(a) (19) of this title within thirty days after receipt of aid with respect to such children;

(B) for entering into cooperative arrangements with the State agency responsible for administering or supervising the administration of vocational education in the State, designed to assure maximum utilization of available public vocational education services and facilities in the State in order to encourage the retraining of individuals capable of being retrained; and

(C) for the denial of aid to families with dependent children to any child or relative specified in subsection (a) of this section—

(i) if, and for so long as, such child's father is not currently registered with the public employment offices in the State, and

(ii) with respect to any week for which such child's father receives unemployment compensation under an unemployment compensation law of a State or of the United States.

(c) Notwithstanding any other provisions of this section, expenditures pursuant to this section shall be excluded from aid to families with dependent children (A) where such expenditures are made under the plan with respect to any dependent child as defined in subsection (a) of this section, (i) for any part of the 30-day period referred to in subparagraph (A) of subsection (b) (1) of this section, or (ii) for any period prior to the time when the father satisfies subparagraph (B) of such subsection, and (B) if, and for as long as, no action is taken (after the 30-day period referred to in subparagraph (A) of subsection (b) (2) of this section), under the program therein specified to refer such father to the Secretary of Labor pursuant to section 602(a) (19) of this title.

(d) For purposes of this section—

(1) the term "quarter of work" with respect to any individual means a calendar quarter in which such individual received earned income of not less than $50

(or which is a "quarter of coverage" as defined in section 413(a) (2) of this title), or in which such individual participated in a community work and training program under section 609 of this title or any other work and training program subject to the limitations in section 609 of this title, or the work incentive program established under part C;

(2) the term "calendar quarter" means a period of 3 consecutive calendar months ending on March 31, June 30, September 30, or December 31; and

(3) an individual shall be deemed qualified for unemployment compensation under the State's unemployment compensation law if—

(A) he would have been eligible to receive such unemployment compensation upon filing application, or

(B) he performed work not covered under such law and such work, if it had been covered, would (together with any covered work he performed) have made him eligible to receive such unemployment compensation upon filing application.

**National Labor Relations Act.**

Sec. 8. (a) It shall be an unfair labor practice for an employer—

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: